(4)

No. 94-197

IN THE
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, *et al.*,
Petitioners,

v.

DESHAWN GREEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION; UNITED STATES REPRESENTATIVES MICHAEL HUFFINGTON, STEPHEN HORN, AND RICHARD POMBO; CALIFORNIA SENATORS K. MAURICE JOHANNESSEN, DAVID KELLEY, NEWTON RUSSELL, DON ROGERS, BILL LEONARD, PHIL WYMAN, TIM LESLIE, AND ROB HURTT; CALIFORNIA STATE ASSEMBLY MEMBERS MICKEY CONROY, RICHARD K. RAINEY, DEAN ANDAL, PAULA L. BOLAND, RICHARD L. MOUNTJOY, JAMES ROGAN, BILL MORROW, BERNIE RICHTER, BILL HOGE, DAVID KNOWLES, TRICE HARVEY, AND JAN GOLDSMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF
THE WASHINGTON LEGAL FOUNDATION,
ET AL., IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation, *et al.*, respectfully move for leave to file the attached brief *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this

brief.[1] This motion is made necessary by the refusal of Respondents' counsel to provide consent.

Amici believe that the Constitution allows reasonable limitations on public assistance based on duration of residence, such as the California provision at issue in this case, as a means of adjusting the burdens of welfare budget cuts away from established residents who may have greater difficulty adjusting to them. The attached brief provides substantial information, not contained in the petition for certiorari, regarding the nationwide effect of the decision below upon similar residency-based programs that other states have authorized. It also supplements the petition for certiorari by discussing the disparate decisions of state supreme courts on this issue.

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with over 100,000 members and supporters nationwide whose interests WLF represents. WLF engages in litigation and participates in administrative proceedings in a variety of areas and devotes a substantial amount of its resources to cases that affect the interests of voters and taxpayers. For example, WLF filed *amicus* briefs in *United States v. Carlton*, 114 S. Ct. 2018 (1994) (validity of retroactive changes in federal tax statute) and *U.S. Term Limits, Inc. v. Thornton* (Sup. Ct. No. 93-1456) (validity of state term limits for Members of Congress).

The twenty-three legislators joining this brief are members of California's delegation to the U.S. House of

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[1] Petitioners' letter of consent to the filing of this brief has been lodged with the Clerk of this Court.

Representatives, the California Senate, and the California State Assembly who strongly support California's position in this case. Those legislators — United States Representatives Michael Huffington, Stephen Horn, and Richard Pombo; California Senators K. Maurice Johannessen, David Kelley, Newton Russell, Don Rogers, Bill Leonard, Phil Wyman, Tim Leslie, and Rob Hurtt; and California State Assembly Members Mickey Conroy, Richard K. Rainey, Dean Andal, Paula L. Boland, Richard L. Mountjoy, James Rogan, Bill Morrow, Bernie Richter, Bill Hoge, David Knowles, Trice Harvey, and Jan Goldsmith — believe that the ruling below unnecessarily and detrimentally limits the state's ability to carry out the budget cuts that have been made necessary by its fiscal crisis.

The participation of the *amici* will assist the Court's informed consideration of the petition and will bring important perspectives to bear. For the foregoing reasons, *amici* respectfully request that the Court grant the motion for leave to file the annexed brief *amici curiae* in support of Petitioners.

Respectfully submitted,

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The California statute at issue in this case, California Welfare and Institutions Code § 11450.03, was enacted in 1992 during a period of fiscal crisis in the state. The statute, a welfare reform measure, establishes a reduced level of benefits under the Aid to Families with Dependent Children (AFDC) program during the first twelve months of a recipient's residence in California. For most new residents, that level is the benefit level they would have received if they were still living in their former state.

The decision below, in declaring this measure a violation of equal protection, has added to the disarray of decisions in the lower courts. Residency-based welfare programs of various types have recently been authorized by Illinois, Iowa, Minnesota, New York, Wisconsin, and Wyoming. In suits challenging the programs of some of those states, divided state supreme court decisions upholding and invalidating those programs have shown the need for this Court's guidance. In addition, the U.S. Department of Health and Human Services (HHS) has indicated that it has temporarily suspended the approval of residency-based programs, based on the concerns about their constitutionality raised by this litigation — concerns that can be resolved only by guidance from this Court.

The decision below treated this measure essentially as if it were identical to the residency requirements considered in *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which this Court struck down state and District of Columbia laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first twelve months of residence in the state. But unlike the situation in *Shapiro*, in which this Court applied strict scrutiny on the basis that

the programs amounted to a "penalty" on the right of interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, if the Constitution is held to require enhanced scrutiny of residency-based programs that states have established solely on their own authority, this Court should consider whether rational basis review should apply when, as here, the state program has been approved by HHS pursuant to congressionally-delegated authority. Finally, if enhanced scrutiny is required in this case despite the federal approval of California's program, this Court should address whether strict scrutiny or an intermediate level of scrutiny is applicable.

ARGUMENT

I. THE VALIDITY OF RESIDENCY-BASED WELFARE PROGRAMS IS AN ISSUE OF NATIONAL IMPORTANCE

Even if the decision below affected only California's public benefits program, and were irrelevant to the public benefits programs of any other state, the consequences of

the decision below would be considerable. The record indicates that the district court's suspension of the implementation of § 11450.03 was expected to "result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in fiscal year 1993-94."[1] The Ninth Circuit's decision overturned not only the judgment of the California legislature that enacted the statute in 1992, but also that of HHS, which had approved it under 42 U.S.C. § 1315(a) as an "experimental, pilot or demonstration project";[2] in approving the program, HHS was obliged to determine that § 11450.03 "is likely to assist in promoting the objectives of" the federal Aid to Families with Dependent Children program. § 1315(a).

But the reach of the decision below extends far beyond California. Prior to this Court's decision in *Shapiro*, at least forty states had a residency requirement of some kind for welfare assistance. *See Shapiro*, 394 U.S. at 677 (Harlan, J., dissenting). Today, numerous state legislatures — including those of Illinois, Iowa, Minnesota, New York, Wisconsin, and Wyoming — have recently established such requirements. *See* 305 Ill. Comp. Stat. Ann. § 5/11-30; 1993 Iowa Acts ch. 97 § 3(5); Minn. Stat. § 256D.065;

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[1] Declaration of Dennis Hordyk, Assistant Director, California Dept. of Finance, Pet. App. A22.

[2] *See* Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, to Eloise Anderson, Director, California Department of Social Services, Oct. 29, 1992 (granting approval of California's application for federal waivers under 42 U.S.C. § 1315(a) of various statutory and regulatory requirements to permit implementation of residency-based benefit levels and other welfare reforms). Copies of this and other letters cited herein have been lodged with the Clerk of this Court.

N.Y. Soc. Serv. § 158(f); Wis. Stat. § 49.015; Wyo. Stat. § 42-2-107(a)(iii).[3]

At least one of these states, Wisconsin, received approval for its requirement from the Secretary of Health and Human Services.[4] In the wake of the decision of the district court below, however, HHS has indicated to other states that "until the matter is resolved," it will not approve further applications for approval of residency-based benefit levels because "serious issues" regarding their constitutionality "are currently being litigated."[5]

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[3] As discussed in Part II *infra*, some of these statutes have been challenged in the lower courts on federal constitutional grounds.

[4] *See* Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, U.S. Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Services, July 27, 1992.

[5] In response to the application of Illinois for approval of its residency-based benefit levels, HHS stated:

> I regret to inform you that your application for the waivers necessary to enable Illinois to implement the Relocation to Illinois Project is denied. Serious issues regarding the constitutionality of this provision have arisen, and are currently being litigated. Until the matter is resolved, we are not authorizing further research in this area.

Letter from Laurence J. Love, Acting Assistant Secretary for Children and Families, U.S. Department of Health and Human Services, to Robert W. Wright, Acting Director, Illinois Department of Public Aid, July 30, 1993. *See also* Letter from Donna E. Shalala, Secretary of Health and Human Services, to Michael Sullivan, Governor of Wyoming, Sept. 1, 1993 (to the same effect).

(continued...)

II. THE LOWER COURTS ARE IN DISARRAY AS TO THE PROPER STANDARD FOR DETERMINING WHETHER A RESIDENCY-BASED WELFARE PROGRAM IS CONSTITUTIONAL

The need for guidance from this Court as to the standard for evaluating residency-based welfare programs is reflected not only by the uncertainty over the issue in the federal Executive Branch, but also by the recent decisions of state supreme courts, which have reached differing results in considering challenges to those programs.

In *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992), a divided Wisconsin Supreme Court upheld a sixty-day waiting period for welfare benefits. The Court noted the "unsettled nature of the degree to which a durational residency requirement must impinge upon the right to travel to be unconstitutional," 485 N.W.2d at 901, and quoted this Court's characterization of *Shapiro* in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974):

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be *per se* unconstitutional. The Court's holding

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[5] (...continued)

Illinois has implemented its statutory waiting period for certain benefit programs that are wholly state-funded. *See* Matthew Poppe, *Defining the Scope of the Equal Protection Clause with Respect to Welfare Waiting Periods*, 60 U. Chi. L. Rev. 291, 302 n.77 (1994) (student note).

> was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give rise to the compelling-state-interest test was not made clear.

485 N.W.2d at 901 (quoting *Memorial Hospital*, 415 U.S. at 256-57) (citations omitted).

The Wisconsin Supreme Court concluded that the statute before it did not amount to a penalty on interstate travel because the duration of the residency requirement was short and because the statute provided for various exceptions (none of which, however, covered the case of an individual or family that migrated to Wisconsin in indigency and without close relatives in the state). 485 N.W.2d at 902-03. Applying the rational basis test, the Court upheld the requirement based on the state's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.* at 905.

On the other hand, a divided Supreme Court of Minnesota held in *Mitchell v. Steffen*, 504 N.W.2d 198 (1993), *cert. denied*, 114 S. Ct. 902 (1994), that the state could not set a newcomer's welfare benefits for the first six months of residence at "the lesser of the benefits actually received in the last state of residence or the maximum benefits allowable" under Minnesota law. The Court found the limitation to constitute a penalty. 504 N.W.2d at 202. Applying strict scrutiny, the Court found that the statute's

purpose, "to conserve state funds," was not compelling. *Id.* at 203.[6]

The differing conclusions among and within these courts is an inevitable product of the absence of a clear standard in the case law of this Court. Neither *Shapiro* nor subsequent cases indicate whether enhanced scrutiny must be applied to residency-based benefit levels that are shorter than one year in duration or that do not involve a complete deprivation of benefits. As the Third Circuit has observed, "The Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say that where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry." *Schumacher v. Nix*, 965 F.2d 1262, 1267 (3d Cir. 1992).

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[6] In addition, a New York State trial court has held that a reduced benefit level during the first six months of residency for New York's state-funded Home Relief program violated the federal constitution under either strict scrutiny or a rational relationship test and that it also violated the state constitution. *Aumick v. Bane*, 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994). A federal district judge, in approving a consent decree, memorialized his views as to the unconstitutionality of an Indiana residence requirement in *Eddleman v. Center Marion City*, 723 F. Supp. 85 (S.D. Ind. 1989).

III. CALIFORNIA'S RESIDENCY-BASED WELFARE LEVELS SATISFY EQUAL PROTECTION

A. The Residency-Based Benefit Levels Should Not Be Deemed a "Penalty"

The district court decision below, adopted by the Ninth Circuit, found the California program to be a "penalty" on the ground that it treats recent residents of California different from other California residents and involves "necessities of life." Pet. App. A14. Hence, the court held that strict scrutiny was applicable and that the classification could not be justified by the state's interest in "conserv[ing] limited State funds in the hope that the State may do more for those who now and in the past have depended on the State." Pet. App. A16.

As discussed in detail in the Petition, the case law of this Court compels no such result. *See* Pet. at 8-12. In particular, because § 11450.03 generally provides new residents the same benefits that they had been receiving before moving to California, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word.

The court below sought to sidestep this difficulty in its analysis by pointing out that the program "makes no accommodation for the different costs of living that exist in different states." Pet. App. A13. But that is a feature of the federal AFDC program itself, which permits a state to set its benefit level at an amount less than the standard of need it has calculated; under 42 U.S.C. § 602(a), a state is free to "pare down payments to accommodate budget

realities by reducing the percentage of benefits paid or switching to a percent reduction system." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

Thus, even a state with no residency-based benefit levels may "penalize" a newcomer in the sense of failing to set benefits at a level commensurate with the costs of living in his or her new state. But this Court has never indicated that such a failure is a violation of the right to travel or of any other constitutional right. Hence, the "rationality review" standard under the Equal Protection Clause is properly controlling in this case.

B. The Classification Is Justified by the Differing Reliance Interests of Longtime Residents and Newcomers

The court below found, without analysis, that new residents are "no better able to bear the loss of benefits than a group randomly drawn." Pet. App. A17. This conclusion was error. Residency-based cuts in welfare are a legitimate means of allocating the cuts so that they fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles. Accordingly, under a rational basis standard of review, California's program is clearly permissible.

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect "expectation and reliance interests" has repeatedly been recognized by this Court as a legitimate objective. *See,*

e.g., Nordlinger v. Hahn, 112 S. Ct. 2326, 2333-34 (1992); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980). The pursuit of this objective is proper even if it discriminates against the interests of newcomers. *Nordlinger*, 112 S. Ct. at 2333.[7]

IV. IF CALIFORNIA'S PROGRAM IS DEEMED TO "PENALIZE" INTERSTATE TRAVEL, THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE PROPER SCOPE AND APPLICATION OF THE *SHAPIRO* STANDARD

A. This Court Should Address Whether A Residency-Based Distinction Is Valid If Authorized By Congress

As noted, California's program was approved by the U.S. Department of Health and Human Services pursuant to 42 U.S.C. § 1315(a) on October 29, 1992. *See supra* n.2. Hence, even if California's program is held to be a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a state establishes such a program on its own, but the standard of review to be applied when a state establishes such a program with federal authority. The existence of federal approval provides an independent reason for employing a deferential "rationality review" of a state legislature's adoption of residency-based benefit levels.

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[7] The district court referred to evidence that some supporters of the program regarded it as a means of deterring migration into the state, and indicated that "this may be the purpose," but the court properly declined to make any such factual finding. Pet. App. A15.

In *Shapiro*, the Court found that the Social Security Act as it was then written contained no congressional approval for residency requirements. The Court further indicated in *dicta*, however, that such approval would be unavailing for the states in any event because "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." 394 U.S. at 641.

That analysis is truncated, and should be reconsidered by this Court. The Equal Protection Clause ordinarily requires only "rational basis" review of classifications in welfare measures. *See Dandridge v. Williams*, 391 U.S. 471 (1970). The asserted basis for enhanced scrutiny of residency requirements is not the Equal Protection Clause itself, but a right to travel based on some other constitutional guarantee. *See Shapiro*, 394 U.S. at 630 & n.8.

But as Justice Harlan pointed out in dissent, three of the provisions suggested as bases for that right — the Privileges and Immunities Clause of Art. IV, § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause — are inapplicable to Congress and can be overridden by Congress in their application to the states. *See Shapiro*, 394 U.S. at 666-67 (Harlan, J., dissenting). Moreover, as Chief Justice Warren indicated in dissent, the Commerce Clause, as an affirmative grant of power to Congress, provides ample authority for Congress to allow residence requirements by the states. *See Shapiro*, 394 U.S. at 651 (Warren, C.J., dissenting).

B. This Court Should Address Whether Strict Scrutiny or Mid-Level Scrutiny Is Applicable To Programs That "Penalize" Interstate Travel

If a residency-based program such as California's is to be subjected to enhanced scrutiny, this Court should reconsider whether the all but insurmountable standard of "strict scrutiny" is applicable or whether some lesser degree of scrutiny is more appropriate. It is true that the decisions of this Court that have applied an enhanced level of scrutiny in evalating residence requirements have applied strict scrutiny. *See, e.g., Memorial Hospital, supra; Shapiro, supra*. But it is surely incongruous that a provision of the California Welfare and Institutions Code discriminating against *women* would be judged under a more lenient standard than one discriminating, however modestly, against newcomers.[8] Such an incongruity would also be avoided by judging California's residency-based program under the standards normally applicable for judging welfare measures that do not discriminate against a suspect class. *See Dandridge, supra*.

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[8] A gender-based classification must be "substantially related to the achievement" of "important governmental objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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